Neutral Citation Number [2024] UKUT 248 (AAC) Appeal No. UA-2024-000354-PIP

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

KA

Appellant

- v -

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: Upper Tribunal Judge Stout
Decided on consideration of the papers

Representation:
Appellant: In person
Respondent: B Massie, DMA Leeds

On appeal from:

Tribunal:	First-Tier Tribunal (Social Entitlement Chamber)
First-tier Tribunal Case No:	SC240/22/01198
Digital Case No:	1667400620454193
First-tier Tribunal Venue:	Bradford (in person)
First-tier Tribunal Hearing Date:	14 June 2023 and 30 November 2023

Anonymity: The appellant in this case is anonymised in accordance with the practice of the Upper Tribunal approved in *Adams v Secretary of State for Work and Pensions and Green (CSM)* [2017] UKUT 9 (AAC), [2017] AACR 28.

SUMMARY OF DECISION

RIGHT TO RESIDE (29.7)

The First-tier Tribunal's decision is set aside because it proceeded unfairly by deciding the appellant's case: (a) on the papers on 15 June 2023; (b) without hearing from the appellant in person at a further hearing on 30 November 2023, having told her that she did not need to attend the hearing; (c) on the basis of a submission from the Secretary of State's representative to which the appellant had no opportunity to respond; and (d) on the basis of documents provided by the Home Office to the Secretary of State that the Secretary of State said the Home Office did not wish to be disclosed to the Tribunal or the appellant. The Tribunal should have adjourned the hearing(s) to enable the appellant to respond to the Secretary of State's submission, and should have ordered the documents to be disclosed to the Tribunal and the appellant.

The Tribunal also failed to give any adequate or rational reasons why it accepted the submission from the Secretary of State's representative over the appellant's documentary evidence that she had had indefinite leave to remain since 2001.

The Secretary of State supported the appellant's appeal to the Upper Tribunal. The Secretary of State having now received confirmation from the Home Office that the appellant was granted indefinite leave to remain in 2001 in accordance with the appellant's documentary evidence, the Upper Tribunal remakes the decision in the appellant's favour.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), b(ii) and (4) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake the decision by allowing the appellant's appeal against the Secretary of State's decision of 31 May 2022. The appellant was not at that date a person subject to immigration control and was therefore entitled to make a claim to Personal Independence Payment.

REASONS FOR DECISION

Introduction

1. The appellant appeals against the First-tier Tribunal's decision of 15 June 2023 refusing the appellant's appeal against the decision of the Secretary of State of 31 May 2022. The First-tier Tribunal upheld the Secretary of State's decision that the appellant was not entitled to Personal Independence Payment (PIP) as at the date of the decision because she was "subject to immigration control".

2. At a further hearing on 30 November 2023, the First-tier Tribunal refused to set aside the previous decision. The First-tier Tribunal's Statement of Reasons (SoR) was issued on 28 December 2023 and permission to appeal was refused by the First-tier Tribunal in a decision issued on 8 February 2024. The appellant filed the notice of appeal to the Upper Tribunal on 8 March 2024 (in time).

3. In a decision sent to the parties on 17 June 2024 I granted permission to appeal. The Secretary of State in a response dated 16 July 2024 supports the appeal and invites me to remake it in the appellant's favour as the Secretary of State now accepts that the appellant was granted indefinite leave to remain in 2001 and was therefore not subject to immigration control at the time of the decision under appeal.

4. The parties have consented to me determining the appeal on the papers as permitted by rule 34(1) and I am satisfied that it is appropriate for me to do so as this is a straightforward case where the parties are in agreement and there would be no benefit in holding a hearing.

5. The case does, however, provide a good illustration of the importance of the First-tier Tribunal dealing with the question of whether someone has the right to reside with the same care as to evidence and procedure as it would any other

evidential dispute. Mistakes can be made by the Home Office and the Secretary of State, as happened in this case, and Tribunals must ensure that they do not abnegate from their duties of fact-finding and procedural fairness just because they have been verbally informed that Home Office records contradict an appellant's case.

Background

6. The claimant is a Pakistan national. She made a claim to PIP on 22 March 2022.

7. Following an enquiry to the Home Office by the Secretary of State, the Home Office responded that the claimant did not have valid leave to remain in the UK, that there was no on-going application, that she did not have the right to work, and did not have recourse to public funds.

8. On 31 May 2022, the Secretary of State determined that the claimant is a person subject to immigration control and was not entitled to PIP from the date of her claim.

9. The claimant asked that the decision be looked at again, explaining that she had been resident in the United Kingdom for 20 years and in receipt of child benefit and child tax credit during that time.

10. On 18 October 2022, the decision maker determined that the decision was unchanged.

11. On 2 November 2022, the claimant appealed the decision by the Secretary of State to the First Tier Tribunal.

12. The matter first came before the First-tier Tribunal on 20 March 2023 when it was adjourned, the Secretary of State being directed to provide further evidence in default of which the Tribunal proposed to allow the appeal on the basis of the information provided by the appellant.

13. The SoR details what happened next as follows:-

> 9. The respondent provided a supplementary response on 27.03.23.

> 10. The supplementary response confirmed that the respondent had been provided with information from the Home Office which stated that the appellant does not have recourse to public funds. The document had not been included in the appeal bundle, as it had been provided to the respondent on the express understanding that it could not be shared with a third party. This, apparently, included the Tribunal.
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> 11. The Tribunal concluded that it must, therefore, rely upon what it was being told by the respondent and must disallow the appellant's appeal and did so on 15.06.23.

14. In the 15 June 2023 decision notice the judge explains: "I have made this decision on the papers as, in the light of the respondent's submission, there can be no other outcome."

15. The decision notice makes no reference to evidence submitted by the appellant (at least by 2 May 2023: see her email at p 160 of the First-tier Tribunal bundle) in the form of a letter from the Home Office, stamped 17 May 2001, granting her indefinite leave to remain in the United Kingdom, with no restrictions on recourse to public funds, and no reference to that leave having been given as a result of a maintenance undertaking.

16. The SoR, however, sets out what the judge considered happened after the 15 June 2023 decision as follows:-

> 12. Following this decision, the appellant submitted further information, including a UAN number.
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> 13. The Tribunal required further information, as to whether this would impact upon the decision it had made. This was requested by Directions Notice dated 18.08.23.
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> 14. When the requested information was not forthcoming, the Tribunal directed that the matter be listed before it, so that a Presenting Officer from the respondent could attend at the

> Tribunal to explain what the position is. The appellant was told that she could attend should she so wish, but that she did not need to do so. She elected not to attend.

17. The hearing referred to in that last paragraph was a hearing on 30 November 2023. The SoR describes what happened at that hearing in the appellant's absence as follows:-

> 15. The matter came before the Tribunal on 30.11.23.
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> 16. A Presenting Officer attended. He explained that, in the light of the provision of the UAN number, he had contacted the Home Office. He was expressly prohibited from sharing a copy of the information provided with the Tribunal, but he was prepared to read it:
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> The following questions were asked and answered, as things stood since the appellant has been granted a new passport (20.06.23):
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> 1. Is there a trace of the customer: Yes
> 2. Summary status: Settlement ILR/NTL
> 3. History: granted indefinite leave to remain. The original grant date was not confirmed on the system but there is no time limit stamp on a new passport issued on 20.06.23.
> 4. Does the appellant have recourse to public funds: Yes. The appellant has entitlement since the issue of her new passport.
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> 17. The Presenting Officer confirmed that, at the date of the decision (31.05.22) the appellant did not have recourse to public funds. This was only granted at the time that the no time limit stamp was placed on her passport on 20.06.23. 18. The Presenting Office was able to share the details relating to the appellant's original application on 31.05.22:

> 1. Does the appellant have valid leave to remain: No
> 2. Does the appellant have a right to work: No.
> 3. Does the appellant have recourse to public funds: No.
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> 19. Thus, the Presenting Officer confirmed, at the date of the original decision, on 31.05.22, the appellant did not have recourse to public finds, but, since her application for a new passport, on 20.06.23, she does have such recourse.
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> 20. Therefore, the appellant may now make her application for PIP and it is to be hoped that she has done so.

Why I have decided that the Tribunal erred in law

18. In this case, the sole issue for the Tribunal was whether the appellant was, at the time of the decision, a person "subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999" so that, by virtue of regulation 16 of the Social Security (Personal Independence Payment) Regulations 2013 (the 2013 Regulations) and section 77(3) of the Welfare Reform Act 2012, she was not entitled to claim PIP. So far as relevant, section 115(9) of the 1999 Act defines "a person subject to immigration control" as a person who:

> (a) requires leave to enter or remain in the United Kingdom but does not have it;
> (b) has leave to enter or remain in the United Kingdom which is subject to a condition that he does not have recourse to public funds;
> (c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking;

19. It was a question of fact for the Tribunal in this case to determine whether the appellant fell within that statutory definition or not.

20. As noted, the appellant had produced at least by 2 May 2023, i.e. prior to the First-tier Tribunal's 15 June 2023 decision, evidence of a letter from the Home

Office, stamped 17 May 2001, granting her indefinite leave to remain in the United Kingdom, with no restrictions, and no reference to that leave having been given as a result of a maintenance undertaking. On its face, that was strong evidence that she was not subject to immigration control as at the date of the Secretary of State's decision under appeal.

21. The First-tier Tribunal decided the appellant's case:

    a. without hearing from the appellant in person on 15 June 2023, proceeding on the papers on the basis that the information from the Secretary of State meant that there could be "no other outcome";

    b. without hearing from the appellant in person on 30 November 2023, having told her that she did not need to attend the hearing;

    c. on the basis of an oral submission from the Secretary of State's representative to which the appellant had no opportunity to respond;

    d. on the basis of documents provided by the Home Office to the Secretary of State that the Secretary of State refused to share with the Tribunal or the appellant.

22. What fairness requires depends on the circumstances of the particular case, but the fundamental principles include that both sides have the right to be heard and an opportunity to make representations on any matter that may weigh against them in the proceedings (see, if need be, the well-known passage in Lord Mustill's speech in *R v SSHD, ex p Doody* [1994] 1 A.C. 531 at 560). The overriding objective in rule 2 of *The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008* ("the First-tier Tribunal Rules") also requires the Tribunal to exercise its case management powers to deal with a case fairly and justly and with a view to "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings".

23. Further, under rule 27 of the First-tier Tribunal Rules "the Tribunal **must** hold a hearing …. unless (a) each party has consented …. and (b) the **Tribunal** considers that it is able to decide the matter without a hearing". It is well established that the Tribunal must keep under review the question of whether it is fair to proceed without an oral hearing or whether to proceed in a party's absence, even where they have consented to a decision on the papers. Adequate reasons must be given for a decision to proceed on the papers. See, for example, *MM v Secretary of State for Work and Pensions (ESA)* [2011]

UKUT 334 (AAC) per Commissioner Mesher, *JP v SSWP* [2011] UKUT 459 (AAC) *per* Judge Poynter and *PM v SSWP* (IB) [2013] UKUT 301 (AAC) *per* Judge Bano.

24. I am satisfied, and the Secretary of State accepts, that the Tribunal did not adhere to those principles in this case. Indeed, the procedure adopted by the Tribunal both on 15 June 2023 and 30 November 2023 was wholly unfair.

25. On 15 June 2023 the Tribunal proceeded on the papers when it is not apparent that the appellant had consented to that. It was also unfair to do so on the basis of documentary evidence the existence of which had only been asserted by the Secretary of State and which had not been disclosed to the Tribunal or the appellant.

26. On 30 November 2023, the Tribunal was aware that the appellant had likely not attended the hearing because she had been told she did not need to attend. The Secretary of State provided new evidence at the hearing and fairness required that the hearing be adjourned in order for the appellant to have an opportunity to respond to the new evidence. For that opportunity to be fair and effective, the Tribunal needed to order the Secretary of State to disclose to the Tribunal and the appellant the material received from the Home Office (using its case management powers in rule 5(3)(d)).

27. The Tribunal gives no reasons explaining why it did not exercise its case management powers to order the Secretary of State to disclose the Home Office information on which reliance was placed. The Tribunal exercises an inquisitorial jurisdiction and these are not adversarial proceedings. The parties are under a duty by rule 2(4) to co-operate with the Tribunal to further the overriding objective. A “cards on the table” approach is required. The documents were in the possession of the Secretary of State and the Tribunal could have ordered them to be produced by the Secretary of State notwithstanding the Home Office’s stated objection; alternatively, the Tribunal could have ordered the Home Office as a third party to disclose the documents.

28. It appears from the judge’s comment in the 15 June 2023 decision notice to the effect that there could be “no other outcome” given the information received from the Home Office that the Tribunal was proceeding on the misunderstanding that whatever the Home Office said (via the Secretary of State for Work and Pensions’ representative) must be correct so that there was no purpose to be served in allowing the appellant an opportunity to answer the case against her. Sometimes, in some cases, that might be a reasonable and

lawful approach to take, but not in general (because justice must not only be done but be seen to be done) and not in this case for the following reasons.

29. The appellant had produced evidence in the form of the 2001 letter granting her indefinite leave to remain. There was no evidence as to why or how that grant might have been revoked so as to result in her being subject to immigration control at the time that she made her application for PIP. As such, the Tribunal could not reasonably regard the Secretary of State's oral submission as determinative of the appeal. The Tribunal had a fact-finding function to fulfil and that required it, if it was going to find against the appellant, to explain why it was rejecting her documentary evidence in favour of the 'say so' of the Home Office/Secretary of State. Mistakes can be made by public officials and the Tribunal must not abdicate its fact-finding and decision-making function in such cases. However, the Tribunal does not deal with the appellant's evidence in its decision at all.

30. In short, the Tribunal in this case dealt with the appellant's case unfairly for inadequate and perverse reasons.

Conclusion

31. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

32. As the Secretary of State now accepts, the appellant did indeed have indefinite leave to remain from 2001 in accordance with the letter that she produced as evidence to the Tribunal. The error appears to have arisen as a result of a difference in the spelling of the appellant's first name in the Home Office records at different times. The Secretary of State invites me to re-make the decision under section 12(2)(b)(ii) in the appellant's favour and I do.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 16 August 2024